

65538-8

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MAR 23 2011

King County Prosecutor
Appellate Unit

65538-8

NO. 65538-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARJO PETRILLI,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Regina S. Cahan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

STATE V. BASHAW¹ REQUIRES REVERSAL OF THE FIREARM ENHANCEMENT.

The State argues the jury instruction requiring unanimity for a “no” answer to the special verdict was correct because the statute governing firearm enhancements “requires jury unanimity for any verdict.” Brief of Respondent at 9 (citing RCW 9.94A.533(3)(b)). But like the school bus stop enhancement at issue in Bashaw, RCW 9.94A.533(3)(b) is silent on the issue of unanimity:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

...

¹ State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

It appears the State is referring, not to a statutory unanimity requirement imposed by our Legislature, but to the unanimity requirement of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), for any fact that increases the penalty for a crime beyond the standard range and to the Washington Constitution's general unanimity requirement for jury verdicts. Brief of Respondent at 9.

Presumably the Washington Supreme Court was aware of the Apprendi and Blakely decisions when it held in Bashaw that unanimity was not required to acquit on a special verdict. Apprendi pre-dates even State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), which the court relied on in Bashaw. See Bashaw, 169 Wn.2d at 145-46 (citing Goldberg, 149 Wn.2d at 894, 895). The court likely did not concern itself with this precedent because neither Apprendi nor Blakely considered the effect of a non-unanimous decision on a special verdict to determine such facts. Blakely, 542 U.S. 296; Apprendi, 530 U.S. 466. Nor does article I, section 21 explicitly address this situation. The State suggests the court should defer to the Legislature's policy judgment, but there is no indication in the statutory language of RCW 9.94A.533 that the Legislature ever considered this issue. The State has not

provided reason for this Court to disregard the binding precedent of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

The mere fact that the Bashaw court reviewed the error without an objection below indicates it considered the error of constitutional magnitude. 169 Wn.2d at 147-48. The Bashaw court also applied a constitutional harmless error analysis. Id. Additionally, it is well-settled that error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal. State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000). Merely because Bashaw stated its decision was not grounded in double jeopardy did not exclude the possibility that the erroneous instruction affects other constitutional rights such as due process. This instructional error is of constitutional magnitude and had the practical and identifiable consequence of adding 36 months to Petrilli's 6-month standard range sentence. Under Bashaw and RAP 2.5, this error in the procedure by which the jury arrived at its verdict is properly raised for the first time on appeal and cannot be harmless. Bashaw, 169 Wn.2d at 147-48.

Therefore, Petrilli's firearm enhancement should be reversed. Regarding the scrivener's error in the Judgment and Sentence, it appears the State is correct that the error has been corrected and the second issue raised in the opening Brief of Appellant is now moot.

B. CONCLUSION

The State has not demonstrated why this Court should fail to follow the mandatory authority of the Washington Supreme Court's decision in Bashaw. Petrilli's firearm enhancement should be reversed.

DATED this 28th day of March, 2011.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	
v.)	COA NO. 65538-8-1
)	
MARIO PETRILLI,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF MARCH, 2010 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARIO PETRILLI
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1313 N. 13TH AVENUE
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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MARCH, 2010.

x *Patrick Mayovsky*